United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7457

To be argued by
ARTHUR E. MCINERNEY

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JAMES MORRISSEY,

Plaintiff-Appellant,

v.

NATIONAL MARITIME UNION OF AMERICA,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

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In the

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James Morrissey,

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v.

National Maritime Union of America,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

Brief on behalf of Plaintiff on his appeal from the judgment which set aside the verdicts against National Maritime Union of America

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Statement

The plaintiff has appealed from the judgments *n.o.v.* which dismissed the causes of action for punitive damages against the defendant, National Maritime Union of America (NMU) in the sum of $50,000 for the violation of plaintiff's rights under LMRDA and in the additional sum of $50,000 for the common law tort of malicious prosecution. The grounds for the judgments *n.o.v.* were that the union had not authorized or ratified the wrongful acts of the union officials.

The issues

Four questions are raised by this appeal:

1.

May a union be held in damages for a violation by its officers of LMRDA (Title I) § 101; Title 29 U.S.C. § 411.

2.

May a principal disclaim an agent's authority for the first time after a trial of the issue of authority and an adverse verdict.

3.

Did the union's behavior before and at the trial amount to ratification.

4.

When a principal ratifies his agent's acts for one purpose, can he nevertheless escape responsibility for any of the consequences of such acts.

Facts

The proof showed (and the jury found) that the acts which formed the basis for the complaint were perpetrated by Curran, as president of N.M.U., by Wall as Secretary-Treasurer of N.M.U., by Snow as chief security officer of N.M.U. and Nimmo as security officer of N.M.U. Curran and Wall were elected officers. Snow and Nimmo were agents. It is inconceivable how the NMU could possibly act responsibly except through and by means of these officers and agents. Their acts and their purposes were necessarily the acts and purposes of the Union while they were engaged generally in the business of the union to which they had been assigned, or if such acts could rea-

sonably be said to be incidental to such business. The jury so found.

The "notice" was posted by union officials (Core brief, p. 20). It was posted in the name of the union. The arrest was made at the request of union officials. The criminal complaint was made by union employees under the supervision of union attorneys.

The answer of NMU pleaded affirmatively that the arrest and prosecution was justified and based on probable cause (24A).

The case went to trial in that posture. The NMU appeared by counsel. NMU did not disclaim the acts of Curran, Wall, Snow & Nimmo. On the contrary, the NMU adopted such acts, claiming that the notice was reasonable and that the arrest and prosecution were justified and based on probable cause.

At the close of the plaintiff's case, a motion was made to dismiss (501-521A). The stated grounds did not include either absence of authority or absence of ratification.

The motion was renewed upon the same limited grounds at the close of the entire case (561-562A; 564-565A).

The case was submitted to the jury under the following charge on the union's responsibility (652A-653A):

> "I charge you that an employer, in this case the union, is not responsible for the act of its employees unless the act is in furtherance of the employer's business and within the scope of the employee's authority.
>
> An act is within the scope of an employee's authority if it is performed while he is engaged generally in the business of his employer to which he was assigned or if his act may be reasonably said to be necessary or incidental to such employment.
>
> The employer need not have authorized the specific act in question.

> If you find that a person within the scope of his authority and in furtherance of his employer's business either wilfully or recklessly caused injury to the plaintiff, you will find the employer responsible for such act. Even though you find the employee's act was reckless or wilfull, the employer is nonetheless responsible for the act if you find that it was performed in furtherance of the employer's business and within the scope of his authority."

None of the defendants objected to this charge. On the contrary their approval was indicated (See *infra*, p. 12, footnote).

It was only after the verdict and on the formal motion for judgment *n.o.v.* that the union mentioned the alleged need for proof of ratification.

Plaintiff's contention

The plaintiff contends that:

1. The actions under § 411 of Title 29 USC; LMRDA (Title I) § 101 do not require proof of ratification by the union membership.

2. The law of the case is the charge given to which no objection was made.

3. The jury having found that the officers acted within the scope of their authority, ratification should not be required.

4. If ratification is required, NMU's attempt to justify the arrest and prosecution and the retention of the officers perpetrating the acts, amounted to ratification.

5. A principal may not ratify in part and disclaim in part. It is all or nothing.

6. The NMU not having raised the issue of failure to ratify on a Rule 50(a) motion was precluded from raising such issue on a Rule 50(b) motion.

POINT I

LMRDA (Title I) § 101; Title 29 U.S.C. § 411 imposes union obligations for wrongful official acts without proof of ratification by the membership.

The Landrum Griffin Act, created new rights and liabilities. These rights and liabilities cut through the common law and gave individual members of a labor union means for correcting grievances which had not theretofore existed. Accordingly, there is no need to go beyond the Landrum Griffin Act to search for a legal basis for assessing damages against NMU.

The duties and obligations under § 411 Title 29 USC are imposed upon the union and the union s responsible for all damages flowing from a violation of LMRD—including, in a proper case punitive damages (See the following cases cited and discussed at pages 31 to 33 of the plaintiff's answering brief. *International Brotherhood of Boilermakers* v. *Braswell,* (CA 5) 388 F2d 193; *Farowitz* v. *Associated Musicians* (S.D.N.Y.), 241 F. Supp. 895, aff'd 330 F2d 999; *Sipe* v. *Local Union etc.* (MD Pa.), 391 F. Supp. 865; *Fillipaldi* v. *Legasse* (4th Dept.), 18 A.D. 2d 331) and (the case discussed at page 11 of plaintiff's answering brief.) *Eisman* v. *Baltimore Regional,* 496 F2d 1313 (4th Cir., 1974).

The plaintiff has asked for no relief against any individual member of the union except those specifically named as defendants. The judgment against the union could be collected only from the funds of the union and never from the property of a non-party union member.

It follows that the authority of *Martin* v. *Curran*, 303 N.Y. 276 (1951), even if it had governed common law rights, does not reach the causes of action based on Title I causes of LMRDA.

Curran and Wall, as executive officers of the union, had absolute control over union affairs and over the official voice of the union—*The Pilot*. What they did was the act of the union. What they said was the voice of the union. If they had malice, so did the union. When they sought to stifle the plaintiff's voice—the union acted. Their control over the union was so tight that nothing could or would be done by the union without their connivance.

After the plaintiff's forcible expulsion from the hall and after the prosecution of the criminal complaint against him to a final conclusion, the union continued Curran and Wall as officers with full power and Snow was held over as chief security officer.

POINT II

The jury found that the acts committed were within the scope of the authority of these officials.

Judge Ward elaborated on his original charge on this subject, at the jury's request (652A-653A); *supra*, p. 3-4.

The defendants made no suggestion that the membership must have specifically given such authority or that the membership must have ratified the acts of the officers.

Implicit in the verdicts against the union is a finding that Curran, Wall, Snow and Nimmo were acting within the scope of their authority; that their acts were done while they were engaged generally in the business of the union "to which [they] had been assigned" or their acts could "reasonably be said to be necessary or incidental to such employment".

Under this charge—a charge acquiesced in by the *union*—the verdict could be set aside only if there were no evidence to support the proposition that the officers were acting within the scope of their authority as defined in the charge.

However, the punitive damage verdicts were not set aside for that reason—and in fact could not have been. Judge Ward set the verdict aside on the authority of *Martin* v. *Curran,* 303 N.Y. 276. *Martin* v. *Curran* had held that NMU could be charged in damages for libel only on a pleading alleging that the membership had ratified the libel. This was a highly technical point and was criticized in a vigorous dissent by Judge Conway. At page 292 he said:

> "If, viewing NMU *solely* as a New York State unincorporated association under the General Associations Law, we were to hold that neither the members of NMU nor NMU as a juristic entity is the owner and publisher of *The Pilot,* despite the conceded truth of paragraph 11 of the complaint that NMU is both owner and publisher, then *The Pilot* has no owner or publisher answerable to plaintiff who has been libeled and we must say that there is existent in our State a newspaper which is free under State law to libel men and hold them up to public obloquy with impunity and without responsibility. Such a denial of justice the common law of this State has never tolerated nor permitted and this is a common-law libel action."

Certainly the charge, even if it had been incorrect, did not result in a miscarriage of justice so as to justify a correction in spite of the absence of objection (FRCP, Rule 51).

Moreover, the application of *Martin* v. *Curran* has since been severely restricted by the New York Court of Appeals. In *Madden* v. *Atkins,* 4 N. Y. 2d 283 (1958), a union

was held in damages for wrongful expulsion of a member. The plaintiff had been expelled by a trial committee. There was no proof that the action of the committee had been ratified by the union membership. Nevertheless, it was held that the union was liable for "whatever damages they may have sustained" (p. 297).

In distinguishing *Martin* v. *Curran,* Judge Fuld commented at page 296 that in *Martin* the complaint had been dismissed on a motion before trial "for faiilure to allege that the libel had been authorized by the union membership"; that in such a posture there was "no occasion to consider the nature of the proof that would warrant a finding that the libel was an act of the union rather than that of the individuals who compose it". Judge Fuld concluded that in *Madden,* decided after trial, there was a sufficient showing "to justify liability against the organization".

Here the verdict was rendered after a full trial and a sufficient showing to justify a finding of liability against NMU.

POINT III

If proof of ratification were required the record amply supplies such proof.

At the close of the case the plaintiff moved to conform the pleadings with the proof. This motion was granted (565A). The order granting this motion removed the technical pleading problem which concerned the Court in *Martin* v. *Curran.*

The proof showed both as to pleadings and trial strategy that NMU came into court—not to repudiate the behavior of its officers—but to justify such behavior. With full knowledge of the claims made by the plaintiff against the Union, the Union insisted that the notice had been properly posted; that it was reasonable to silence Morrissey and that there was probable cause for the arrest and prosecution.

During the trial, the union's counsel made it clear that the liability of the union both as to compensatory damages and punitive damages depended solely upon the issue of whether or not the officers were acting within the scope of their authority at the time of the arrest and prosecution. At page 324A he said:

> "Mr. Mina: We would take the position that the law is very clear that if any of the named defendants were shown to be malicious, it is possible, depending on their position, that their maliciousness might be attributable to the union, but only through them.
>
> "The union as an entity does not really exist except through the members, can only be held to be malicious through maliciousness shown on the part of one of the defendants."

The union went to jury on that issue, under a charge approved by the union, and lost. Having lost, it now claims, after verdict, that no liability rests upon it for reason of non-ratification.

This argument ignores the rule that efforts on the part of a principal to justify the acts of its agent is itself ratification of the acts which the principal has attempted to justify.

When as here the agents are so identified with the union that it can, logically and reasonably, be said that the agent is the principal and the principal the agent (Curran is NMU & NMU is Curran) very little other proof of ratification should be required. Here NMU had the option either to come to trial disclaiming the acts of its officers and standing above the controversy* or to adopt these acts and justify them if it could. NMU elected to follow the latter course. What better proof could be adduced of a conscious and intentional ratification?

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* Had it done that, Curran, Wall and Snow would have been put "out on a limb" all by themselves. That it did not wish.

What did *Martin* v. *Curran* mean by ratification? Would it require an affirmative vote of each union member? That is what the union now claims (see the NMU separate brief at page 2). If not, how would ratification by a majority be binding upon a dissenting minority. More perplexing still how would a majority vote of a minority present at a meeting stand. But here we have the union, acting under the advice of competent counsel, attempting to justify the acts which the union now claims were unauthorized (or does it?—see *infra,* footnote p. 11).

Here the union membership knew, through *The Pilot,* the animosity, borne by its elected officials, toward Jim Morrissey. After the arrest and prosecution, they continued Curran and Wall in office; they took no steps to impeach either Curran or Wall. And Snow and Nimmo continued their employment as usual. They later elected Wall as president after Curran's retirement. And finally, at this trial, the union sought to establish that the posted regulation was reasonable and that its officers had "probable cause" for arresting and prosecuting Morrissey. As Martin, J. said in *Anderson* v. *Wood* (First Dept., 1925), 212 A.D. 483 at page 487, quoting with approval from Corpus Juris:

> "'* * * Where an agency has been shown to exist the facts will be liberally construed in favor of a ratification by the principal of the acts of the agent, and very slight circumstances and small matters will sometimes suffice to raise the presumption of ratification, particularly where the act is for the benefit of the principal.'"

The retention of the perpetrators in their positions was evidence supporting ratification of their malicious acts. (See 25 C.J.S. § 125(5), 1158 on punitive damages):

> "*Retention or discharge of servant or agent.* Retention of the servant by the master in his employment, or retention and promotion, may operate as a ratifica-

> tion of the servant's wrongful act, where other elements of due ratification are present."

The attempt of the union, at the trial to justify the officers' behavior was proof of ratification. 25 C.J.S. § 125 (5), 1158, on punitive damages:

> "The attempt of the principal to justify the agent's act in litigation may go to show ratification."

The fact that NMU and the individual defendants appeared by the same trial attorney is further evidence that they were content to stand or fall together.

They fell together and now at long last, the union undertakes to repudiate the behavior of its agents. This repudiation comes too late.* Having "eaten its cake"—the advantage of presenting a united front with its officers on the issue of probable cause—the union would now "have its cake" as well.

POINT IV

Having authorized or ratified the infringement of Morrissey's rights under LMRDA and the arrest and prosecution the Union may not escape responsibility for the full consequences.

The court submitted to the jury the question of whether or not the infringement of Morrissey's rights under LMRDA and the arrest and prosecution were within the scope of the officers' authority to the extent that the union could be held liable for compensatory damages. This was a proper submission. The jury answered the question in the affirmative.

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* As a matter of fact, even now there has been no repudiation by NMU. In its brief as appellant it states at p. 4: "Defendants-Appellant National Maritime Union of America joins in the points raised in the Core brief filed on behalf of all defendants-appellants in this matter." Naturally, it participated in the preparation of the Core brief too.

The court also submitted to the jury the question of whether or not the malice displayed by the officers in executing that mission should be imputed to the union. This was also a proper submission. The jury also answered this question in the affirmative.

The District Court allowed the verdict for compensatory damages to stand. Implicit in this is the conclusion that there was sufficient evidence to support the finding that the union had either expressly authorized the violation of Morrissey's rights under LMRDA and the arrest and prosecution or had ratified those acts. Without such a finding, Judge Ward could not let the compensatory verdicts stand. The finding, of course, was eminently supported by evidence and the decision to let it stand was sound.

But the District Court set aside the verdicts for punitive damages upon the ground that there was no proof of authority to subject the union to a claim for punitive damages or of ratification thereof by the union.

This was error. Both were questions that should have been left to the jury. Both findings were amply supported by evidence.

Moreover, having found that the violation of Morrissey's rights under LMRDA and that the arrest and prosecution were authorized or ratified for compensatory damage purposes, the authorization or ratification for every purpose, including punitive damages, must follow.

A principal may not authorize or ratify an agent's act for a limited purpose.* He may not accept the benefits and

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* Incidentally, the NMU never moved for a directed verdict under Rule 50(a). In moving to dismiss (under Rule 41) the NMU did not argue that the membership had failed to ratify the individual defendants' acts. Having failed to state that specific ground then, it should have been precluded from raising that issue when it moved for judgment *n.o.v.* under Rule 50(b). See Point IX of plaintiff's answering brief, pp. 34-35.

disclaim the agent's authority for the purpose of escaping liability. He may not admit authorization in part and disclaim in part. He may not ratify in part and disclaim in part. This is axiomatic—see 2A C.J.S. 671—Agency § 77:

> "In the absence of consent on the part of the third person concerned in an unauthorized transaction by one purporting to act for a principal, he cannot ratify a part of such transaction but must ratify it in its entirety."

and at page 672

> "* * * the principal may not make the ratification conditional on his suffering no loss."

To hold a principal liable in full damages for the wanton and malicious acts of an agent presents no legal problem once it has been found that the agent was acting within the scope of his authority or that the principal had ratified the agent's acts. See 3 C.J.S. 293—Agency § 428:

> "A principal is liable to third persons injured by the wanton and malicious acts of the agent, provided the act is within the scope of the agent's authority."

and whether or not the wanton or malicious act was within the scope of the agent's authority should be submitted to the jury as a question of fact. As Cullen, C.J. said in *Mager* v. *Hammond,* 183 N.Y. 387 at page 390:

> "To render the defendant Hammond (the principal) liable for the willful, reckless or wanton act of Tompkins (the agent) the act must have been done by Tompkins in the scope of his employment, and whether or not it was so done should be submitted as a question of fact to the jury." (Words in parentheses supplied)

CONCLUSION

The judgment *n.o.v.* should be reversed, the verdicts of the jury reinstated and judgments on the verdicts mandated.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Charles Esposito, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 12 State Street Valley Stream, New York
That on January 2, 1976, he served 2 copies of Brief

on

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